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REPORT ON RECENT ETS  
AND IAQ DEVELOPMENTS

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May 14, 1993

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#### REGULATORY AND LEGISLATIVE MATTERS

##### U.S. CONGRESS

#### [1] Indoor Air Quality Act Introduced in House

On April 29, 1993, Representative Joseph Kennedy (D-Mass.) introduced the House version of the Indoor Air Quality Act of 1993 (H.R. 1930). Co-sponsored by 23 other, mostly Democratic, House members, the measure would authorize \$47 million in spending over the next five years to fund indoor air research, a federal indoor air response plan, and state matching grants for devising local response plans. The House bill does not explicitly mention ETS, and Representative Kennedy did not cite the EPA Risk Assessment on ETS in his remarks at the time the bill was introduced.

The bill, in many respects, is similar to the legislation introduced in the Senate in March 1993 (S. 656), in that its focus is on research into the causes of poor indoor air quality, methods of mitigation, upon coordination of federal and state activities regarding the improvement of indoor air quality. Also, like its Senate companion, the House bill would require an assessment of the role of ventilation in mitigating IAQ problems, but does not establish ventilation standards. The bill would not preempt any other federal or state law incorporating more restrictive compliance standards.

Unlike its Senate counterpart, the Kennedy bill does not require publication of a list designating contaminants known to have an adverse impact on human health. It does, however, require the EPA to publish "indoor air contaminant health advisories" on a prescribed schedule.

The bill has been referred to three House committees: Education and Labor; Energy and Commerce; and Science, Space and Technology. At the time this Report was prepared, no committee action had been scheduled on the measure.

Kennedy introduced similar IAQ legislation in past sessions of Congress that failed to gain passage. Provisions of the prior bills, which some believed blocked earlier passage, would have required an OSHA ventilation-based standard as well as mandatory, product-emission labelling. Those provisions were dropped from H.R. 1930.

#### [2] Smoking Accommodation Policy Takes Effect in House Office Buildings

On May 7, 1993, the House Office Building Commission announced its policy for smoking restrictions in public areas of all House office buildings would take effect immediately. Smoking will only be permitted in designated areas. Speaker of the House Thomas Foley (D-Wash.) directed that a similar policy be implemented for the House side of the Capitol.

In areas assigned to House members, committees and support offices, smoking policies are to be determined by each member, committee chair and support office head. The Capitol Architect has been directed to develop a plan for the Office Building Commission's approval designating public areas where smoking will be permitted.

#### U.S. ENVIRONMENTAL PROTECTION AGENCY (EPA)

#### [3] Hearings on Risk Assessment Bill Expected

The Senate Environment & Public Works Committee is reportedly expected to hold hearings in May or June on a bill that would coordinate the development and implementation of environmental policies at EPA. The bill, S. 110, was introduced in January 1993 by New York Senator Patrick Moynihan (D). See issue 41 of this Report, February 19, 1993.

The measure would establish committees that would attempt to formalize risk assessment by ranking relative risks and by estimating the quantitative benefits of reducing risks. Critics have warned that current scientific knowledge is insufficient to support such an

effort. Supporters, however, contend that the matter must be addressed regardless of its complexity.

According to a press report, Representative Dick Zimmer (R-NJ) is considering introducing a companion bill in the House. See *Inside EPA*, April 30, 1993.

#### [4] Senate Approves Measure to Elevate EPA to Cabinet Level Status

On May 4, 1993, the Senate voted 79-15 to approve a bill which would give the EPA a seat in the President's Cabinet (S. 171). The Senate measure would establish a new Department of Environmental Protection and would permit regional offices to continue as they are presently set up. The bill would abolish the White House Counsel on Environmental Quality. Among the amendments reportedly added to the bill is a provision requiring a risk assessment and cost benefit analysis of each final regulation. See *BNA National Environment Daily*, May 5, 1993.

Meanwhile, the House has apparently begun to conduct hearings on its draft EPA bill. Critics of the agency, such as Representatives John Dingell (D-Mich.), Michael Synar (D-Okla.), and Henry Waxman (D-Calif.), are reportedly seeking major reform of the EPA's management, contracting, procurement, science and enforcement policies before they will agree to elevate the agency to Cabinet level. Waxman reportedly opposes the cost benefit analysis that was added to the Senate measure by amendment. During subcommittee hearings, Dingell apparently stressed the need for truthful science, called for an end to "cooked" studies at the agency, and criticized the agency's use of contractors.

According to EPA Administrator Carol Browner, the agency supports much of the House draft bill, which is said to contain many of Dingell's suggestions, including changes in contracting practices and peer review of EPA analyses and reports. See *BNA National Environment Daily*, May 10, 1993.

### U.S. OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION (OSHA)

#### [5] OSHA Nears Completion of IAQ Rulemaking Options Report

According to Charles Adkins, director of OSHA's health standards program, a policy options report

offering several approaches for OSHA to take in promulgating an IAQ rulemaking is nearing completion, and the next agency administrator is expected to make a decision on how to proceed by the summer. The Clinton administration has yet to name an administrator, but the top candidate for the position, former director of the Washington Department of Labor and Industries John Dear, has apparently been hired as an OSHA consultant.

The options paper is expected to offer two major policy options, i.e., either a wide-scale IAQ rule to address ventilation concerns and various contaminants or a separate rule addressing only ETS. Adkins is quoted as saying, "We're looking at a period of six months after a decision is made [by the OSHA administrator] before the rule could be proposed." Adkins further stated that job stress and other "psychosocial factors" will not be addressed in OSHA's efforts to develop an IAQ rule for the workplace. Some studies have indicated that psychosocial factors are at least partly responsible for generating IAQ complaints.

According to an OSHA industrial hygienist, a preliminary assessment of the 1200 comments submitted in response to OSHA's request for information on indoor air has revealed substantial public support for (i) performance-based ventilation standards giving employers flexibility to achieve compliance; (ii) mandatory training for employees who maintain or operate HVAC systems; and (iii) control of the use and introduction of contaminants, solvents and gases in the workplace. A more thorough analysis of the public comments is apparently due this summer. See *BNA Occupational Safety & Health Reporter*, April 28, 1993.

#### [6] OSHA Revising IAQ Compliance Notice

According to a press report, OSHA is currently revising a compliance notice for agency inspectors to continue to conduct workplace IAQ investigations. The compliance notice being used by inspectors evidently expired in October 1991. Even though OSHA has no workplace IAQ regulations, inspectors have reportedly been instructed to respond to employee IAQ complaints and may cite employers under other related standards. According to an OSHA directive on the issue, compliance officers cannot cite employers under the general duty clause of the Occupational Safety and Health Act because (i) most

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industry consensus standards are derived from a combined consideration of comfort and adverse effects and (ii) there are no formal occupational exposure guidelines addressing ETS. *See BNA Occupational Safety & Health Reporter*, April 28, 1993.

#### [7] Labor Secretary Testifies About OSHA Reform Legislation

During an April 28 hearing conducted by the House Education & Labor Committee, Secretary of Labor Robert Reich discussed the issue of proposed OSHA reform. The subject of the hearing was H.R. 1280, *see* issue 43 of this Report, March 19, 1993, but Reich did not address his comments to specific provisions of the reform measure, indicating that the new Administration has not yet had an opportunity to fully consider the bill. Reich did not discuss indoor air quality in his testimony, although several press reports indicated that he did so. *See The Houston Chronicle*, April 29, 1993; *States News Service*, April 28, 1993.

#### [8] ETS-Related State and Local Legislation

##### •California

The Governmental Organization Committee has approved a bill that would enact limited statewide smoking restrictions, but would prohibit many cities from adopting tougher anti-smoking laws in the future (A.B. 996). Cities and communities that already have tougher restrictions would be allowed to keep them. The bill is controversial because it supposedly threatens A.B. 13, a bill that has been approved by the Labor and Employment Committee and would prohibit smoking in enclosed workplaces throughout the state. Both bills are now pending in the Assembly Ways and Means Committee.

Bill 996 could generally ban smoking in restaurants, but would allow a restaurant to set aside up to 30 percent of its area as a smoking section if ventilation meets ASHRAE Standard 62-1989. The restaurant would have to display signs notifying patrons that smoking is allowed in specified areas. The bill would also restrict smoking in workplaces and other indoor public areas. The bill has been criticized as "a tobacco industry Trojan horse. It has the exterior appearance of restricting smoking, yet upon examination it is a ploy by the tobacco industry to stop the momentum for the total workplace smoking ban." *See BNA California -*

*Safety & Health Report*, April 26, 1993, *The United Press International*, April 27, 1993, *Sacramento Bee*, April 28, 1993, and *Los Angeles Times*, April 30, 1993.

##### •Local Governments in Georgia

According to press reports, Fulton County Commissioners passed an ordinance April 21, 1993, banning smoking in most public places. The Clean Indoor Air Ordinance goes into effect May 20, 1993, and prohibits smoking in elevators, hallways, indoor sports arenas, and health care facilities. Employers must create a smoke-free workplace; however, they are not required to spend any money to make structural changes. Restaurants must set aside at least 50 percent of their dining areas for smokers.

Fulton's ordinance was patterned on a DeKalb County law passed last year, but Fulton's law applies to all cities in the county, including Atlanta, while the DeKalb County Legislation applies only to unincorporated areas of the county. The Fulton law exempts state-owned or run buildings, such as jails, the Capitol or the Georgia Dome, and it excludes bars, hotel rooms and cigarette shops. Hartsfield International Airport main terminal is in Fulton County and will fall under the ordinance; however, the concourses do not because they are in Clayton County. A spokesman for the Tobacco Institute was quoted to say that the ordinance "strikes a balance." *See The Atlanta Journal and Constitution*, April 21, April 22, and April 24, 1993.

##### •Hawaii

Governor John Waihee (D) has signed into law a bill that prohibits smoking in all group child care homes, group child care centers and family child care homes during their hours of operation. *See* S.B. 831, 17th Legislative Session - 1st Reg. Sess. (1993).

##### •Local Government in Massachusetts

On May 5, 1993, the Boston City Council approved an ordinance that requires employers to formulate policies on workplace smoking. The measure also prohibits employers from regulating off-the-job use of tobacco by employees. Dropped from the final version of the measure was a section that would have required giving a preference to nonsmokers in making accommodations between smokers and nonsmokers. *See Daily Labor Report*, May 7, 1993.

On April 27, 1993, the Norwell Board of Health reportedly proposed a ban on smoking in public places and workplaces that employ more than three people. Restaurants are exempt as long as they provide a separate



ventilated area for smokers. Voters accepted the measure by a 120-101 vote, according to officials. The president of the Norwell Chamber of Commerce was reported to say, "It's government intrusion in small business." See *The Boston Globe*, May 2, 1993.

#### •New York

According to a news report, Governor Mario Cuomo (D) proposed legislation April 14 that would toughen existing smoking restrictions by, among other things, limiting smoking in the workplace to separately-enclosed, designated rooms. The measure would also require that restaurants, bowling alleys and bingo halls have separate enclosed areas where smoking is allowed. Smoking would be prohibited in fast-food restaurants and other eating establishments that seat fewer than 50 people and don't have a liquor license. Smoking also would be banned in youth centers, child care facilities, community residences, public institutions for children, and residential treatment facilities for children. See *BNA Product Liability Daily*, May 3, 1993, *Gannet News Service*, May 3, 1993, and *National Public Radio*, May 3, 1993.

►New York IAQ Bills, Item 9.

#### •Vermont

According to press reports, the legislature passed a bill on April 27, 1993, that prohibits smoking in restaurants, motels, banks and stores. Governor Howard Dean (D) reportedly has promised to sign the bill after the legislative session ends.

If Governor Dean signs the bill, it will take effect in two stages. On July 1, 1993, smoking will be prohibited in all public buildings, as well as some private buildings that are open to the public, such as libraries, stores, waiting rooms and video arcades. On July 1, 1995, smoking will be prohibited in restaurants, bars, hotels and motels, with an exception for establishments that hold a cabaret license, because they earn more than half their revenue from the sale of alcohol or entertainment. The bill's sponsor was reported to say that the bill was prompted in part by concern over the EPA Risk Assessment on ETS. However, one legislator who opposed the bill was quoted as saying, "The EPA findings were based on prolonged in-home exposure to smoking. There's no evidence about the health risks from occasional, casual exposure." See *The Associated Press*, *The New York Times*, and *Miami Herald*, May 2, 1993.

#### [9] IAQ-Related State and Local Legislation

##### •New York

Bills are pending in both chambers of the New York legislature that would require building owners to develop a "plan" for heating, ventilation and air conditioning and to maintain a log of IAQ complaints (S.B. 4594 and A.B. 3603). The HVAC "plan" would include a description of the building's HVAC system, its operation, and procedures and schedules for maintenance. The plan also would describe ways to minimize contaminant exposure and adverse effects on building occupants during or after renovation or construction.

Most of the bills' provisions are similar, but there are some differences. Only A.B. 3603 requires building owners to keep logs of complaints and maintenance records and to prepare reports responsive to complaints. Only S.B. 4594 specifically requires that the HVAC plan comply with standards established in ASHRAE Standard 62-1989 "or subsequent, updated standards." S.B. 4594 also would require that the HVAC plan be prepared by an engineer licensed by New York State. See A.B. 3603 and S.B. 4594, 215th General Assembly - 1st Reg. Sess. (1993).

#### ETS-RELATED LITIGATION AGAINST CIGARETTE MANUFACTURERS

##### [10] *Blanchard*: Hearing on Defendants' Venue Motions Approaches

A hearing is still scheduled for May 20, 1993, on defendants' motions to transfer venue and motions to strike. The motions have been pending since January.

Three of the 14 plaintiffs in this case presently allege injury from exposure to ETS. Raye Blanchard and Tamara Reed, mother and daughter, both claim damages for unspecified "illness and disease" allegedly resulting from exposure to the ETS from cigarettes smoked by Raye's deceased husband, Thomas, and by Raye herself, who claims she smoked "for about ten years." The third ETS plaintiff, Pamela Kastrin Stephens, claims unspecified "lung and respiratory diseases" allegedly caused by exposure to the ETS from the cigarettes smoked by her deceased father. The named defendants are purported to be the six major U.S. cigarette manufacturers, The Tobacco Institute,

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the Council for Tobacco Research, and a number of wholesalers and retailers. *Blanchard, et al. v. R.J. Reynolds Tobacco Company, et al.* (District Court, Galveston County, Texas) (filed July 31, 1992).

**[11] *Broin*: Lorillard's Motion for Sanctions Granted**

At a hearing on May 11, 1993, Lorillard's renewed motion for sanctions was granted as to the claims filed by plaintiff Bonita Baker. Judge Robert Kaye also said he would dismiss plaintiff Terry Casto, a subject of the sanctions motion who has asked that her claims be dismissed.

In the motion for sanctions, Lorillard sought dismissal of the claims of those plaintiffs who had not fully responded to Lorillard's discovery requests. When the motion was filed, it was directed to eight plaintiffs, but six of them (all except Baker and Casto) filed responses to the discovery requests prior to the May 11 hearing.

The depositions of plaintiffs Gary Hayes and Valerie Gibson have been re-noticed by defendants for June 2 and June 16. They will be the first plaintiffs to be deposed.

A hearing is scheduled before the trial court for May 17 on motions to dismiss plaintiffs' second amended complaint that have been filed by The Tobacco Institute, the Council for Tobacco Research, the Tobacco Merchants Association, and the Florida Tobacco and Candy Association.

At issue in this case are the claims of flight attendants allegedly injured by occupational exposure to ETS. Following the dismissals noted above, the claims of 28 flight attendants remain in the case. In addition, the husband of one of the flight attendants claims loss of consortium. The attendants named as plaintiffs purport to represent a class of approximately 60,000 other attendants.

Injuries alleged by the putative class representatives include lung cancer, breast cancer and unspecified respiratory ailments. Plaintiffs further allege that occupational exposure to ETS on board aircraft causes at least 22 diseases and a reasonable fear of contracting such diseases. The defendants are purported to be the six major U.S. cigarette manufacturers (plus related entities), UST, Inc., United States Tobacco Company, Dosal Tobacco Corp., the Council for Tobacco Research, The Tobacco Institute, and three trade

associations. *Broin, et al., v. Philip Morris, et al.* (Circuit Court, Dade County, Florida) (filed October 31, 1991).

**[12] *Butler*: Dean Butler's Deposition Scheduled**

The deposition of plaintiff Dean Butler, wife of plaintiff Burl Butler, is scheduled to be taken on May 19 and 20, 1993. Mrs. Butler alleges loss of consortium as a result of Mr. Butler's lung cancer. Mr. Butler claims his lung cancer was caused by exposure to ETS in the barbershop he owned and operated for approximately 30 years.

A status hearing is still scheduled for May 28 on plaintiffs' various motions, including their motion for a discovery conference, their motion for leave to file a second amended complaint, and several motions relating to discovery matters. It is possible that a trial date will be set at this hearing.

The defendants in this case consist of the six major U.S. cigarette manufacturers and several local retailers. *Butler v. R.J. Reynolds Tobacco Company, et al.* (Circuit Court, Hinds County, Mississippi) (filed October 21, 1992).

**[13] *Zwillman*: Dismissal Order Entered**

On April 21, 1993, the court formally granted plaintiff's request to dismiss this case with prejudice. Plaintiff had asked that the case be dismissed when he was contacted by telephone during a status conference on April 16.

*Zwillman* was originally a smoking-and-health case filed *pro se* by Wolf Zwillman for himself and as the personal representative of his wife, Marjorie Zwillman, a smoker who allegedly died of lung cancer. Claims that Mrs. Zwillman's injuries were also caused by exposure to ETS were added in an amended complaint. Brooke Group, Ltd., and The American Tobacco Company were the only defendants at the time the case was dismissed. Brooke Group is the successor to Liggett and Myers. *Zwillman v. Brooke Group Limited, et al.* (U.S. District Court, New Jersey) (filed February 15, 1991; second amended complaint adding ETS claims filed February 13, 1992).

## ETS/IAQ LITIGATION NOT INVOLVING CIGARETTE MANUFACTURERS

### RESTAURANTS: DECEPTIVE TRADE PRACTICES

- [14] *In re: Whataburger, Inc.* (District Court, Corpus Christi, Texas) (filed April 1993)

Texas Attorney General Dan Morales has reportedly filed a suit against Whataburger, Inc., seeking to force the company to answer 23 questions about its restaurant smoking policies. Apparently, the attorney general's office wants restaurants to warn their customers that nonsmoking sections may not be smoke free if the ventilation for those areas is not separate from smoking area ventilation. According to Morales, failure to so warn is a violation of deceptive trade laws. See *The Houston Chronicle*, April 25, 1993.

### AMERICANS WITH DISABILITIES ACT (ADA)

- [15] *Emery v. Caravan of Dreams* (U.S. Department of Justice) (filed April 12, 1993)

A woman who allegedly suffers from the degenerative lung disease cystic fibrosis has reportedly filed an ADA complaint with the Department of Justice to force a Fort Worth jazz club to ban smoking as an accommodation of her disability. She claims ETS exposure "severely reduces" her lung function. According to a press report, the complainant, Diane Emery, is representing herself and intends to rely upon the EPA Risk Assessment on ETS to support her claim.

The jazz club, Caravan of Dreams, reportedly does have a nonsmoking section in the front row, and the club is considering expanding its nonsmoking section. According to the club's president, smokers have complained when performers insist that patrons refrain from smoking and that in any event, the club is well ventilated. He has indicated that Emery's discrimination complaint is being reviewed and will be answered by July 1. See *The Dallas Morning News*, May 1, 1993.

### PRISONER CASE

- [16] *Blackwell v. Sheahan*, 1993 U.S. Dist. LEXIS 5650 (U.S. District Court, North District, Illinois, Eastern Division) (decided April 26, 1993)

A U.S. District Court judge has refused at this time to certify as a class action a pro se prisoner's complaint

alleging that prison officials at the Cook County jail discriminated against a number of inmates by moving them to a nonsmoking maximum security division. The court found that the pro se litigant would be unable to protect the interests of the proposed class. In addition, the court found no legal merit to the prisoner's claim of discrimination on the ground that there is no constitutional right to smoke and that loss of smoking privileges does not constitute the infliction of cruel and unusual punishment.

The complaint also alleged, among other matters, that the jail's ventilation is poor. As to this claim, the court gave the prisoner 30 days to amend his complaint to state "how his claim of poor ventilation rises to more than mere discomfort." If the complaint as amended appears to have a "substantial factual basis demonstrating potential legal merit," the court will consider appointing counsel who can determine whether it would be appropriate to seek certification of a class.

### IAQ-SICK BUILDING SYNDROME

- [17] *Bahura v. SEW Investors* (Superior Court, District of Columbia) (filed September 14, 1990)

The trial of this case has been continued from June 28, 1993, and is now scheduled to begin on October 25. A pretrial conference is set for October 1. The case involves employees of EPA who have sued various parties involved in renovation of the Waterside Mall complex that serves as EPA's national headquarters. Plaintiffs allege health problems due to poor IAQ.

### PUBLIC PLACES: SEPARATION OF POWERS

- [18] *Brammer v. Branstad* (District Court, Polk County, Iowa) (decided April 2, 1993)

A district court judge has dismissed the suit filed by an Iowa legislator who sought a smoking ban in the Statehouse, saying it was an internal matter for the legislature to decide. Attached to Representative Philip Brammer's complaint was an opinion by the Iowa Attorney General, which asserted that state law would prohibit smoking in the Statehouse unless smoking areas were designated therein.

The Chairperson of the Legislative Council had "unilaterally designated the rotunda and legislative

dining rooms as smoking areas," according to Brammer. He alleged the Chairperson had acted unlawfully and without authority in arbitrarily making such designations.

Stating that such a designation was a matter of legislative prerogative, the court held that the issue was not subject to judicial review. According to press reports, Brammer, an ex-smoker who allegedly suffers from chronic lung disease, has vowed to pursue the matter under the Americans with Disabilities Act. See *The Des Moines Register*, April 4, 1993.

#### PUBLIC PLACES: VALIDITY OF SMOKING RESTRICTIONS

- [19] *Operation Badlaw, Inc. v. Licking County General Health District Board of Health*, 1993 U.S. App. LEXIS 8685, (U.S. Court of Appeals, Sixth Circuit) (decided April 13, 1993)

The Sixth Circuit Court of Appeals has dismissed the claims of a non-profit group which had challenged the constitutionality of regulations limiting smoking in public places and places of employment.

Plaintiff Operation Badlaw, Inc., challenged the regulations passed by two Ohio Boards of Health in January 1992 on grounds of equal protection, due process, privacy, commerce clause, and impairment of contract. The court found that none of these rights had been violated and that the regulations had a rational relationship to "the legitimate state purpose of minimizing unwanted exposure to second-hand smoke."

#### WORKPLACE: IAQ/SICK BUILDING SYNDROME

- [20] *Lazarus v. Voith & MacTavish; Karoll v. Voith & MacTavish* (Philadelphia County Court of Common Pleas, Pennsylvania) (filed April 1993)

Two additional plaintiffs have reportedly filed suits against the contractors involved in renovating a library building on the Bryn Mawr College campus near Philadelphia, for injuries allegedly caused by exposure to toxic substances. The contractors were sued in January by college employees Allyn Bensing and Anne Skoogfors. See issue 44 of this Report, April 2, 1993. One of the additional plaintiffs is apparently a student

who has also named the college as a defendant. See *Indoor Pollution Law Report*, April 1993.

#### WORKPLACE: DISABILITY BENEFITS

- [21] *Donato v. Metropolitan Life Insurance Co.*, 1993 U.S. Dist. LEXIS 5780 (U.S. District Court, Northern District, Illinois, Eastern Division) (decided April 30, 1993)

A U.S. district court has granted a motion for summary judgment filed by an insurer who terminated the disability benefits of a legal secretary who claimed she was disabled by a severe allergic reaction to ETS, wall-to-wall carpeting and perfumes. The secretary, Christine Donato, filed this action under the Employee Retirement Income Security Act of 1974 (ERISA), and the court used ERISA's "arbitrary and capricious" standard to uphold the employer's actions.

Although Donato's treating physicians had diagnosed a severe and disabling allergic reaction to environmental chemicals, the insurer's medical consulting firm concluded that she was not disabled and that the therapies she was undergoing "are not widely supported by the AMA, the American College of Physicians, or recognized medical bodies." The court found that the insurer did not arbitrarily and capriciously terminate Donato's disability benefits and ordered that Donato pay the insurer the \$4,640.00 that she had received from the Social Security Administration (SSA). The agreement between Donato and the insurer provided that any benefits paid by the insurer would be reduced by amounts paid or payable to Donato by SSA.

#### WORKPLACE: WORKERS' COMPENSATION

- [22] *Ragle v. State Farm Fire & Casualty Co.*, 1992 WL 471862 (Alaska Workers' Compensation Board) (decided September 24, 1992)

The Alaska Workers' Compensation Board has dismissed a claim for medical costs submitted by a health care provider in a case involving a claim of "systemic immune dysfunction" caused by exposure to mold and other toxins in a "sick building." The claimant in the case, Carol Ragle, is an allergy specialist and nutritional consultant who worked for the health care provider/employer that ultimately provided her

diagnosis and prescribed various purgative treatments and injections.

In its opinion, the Board details the evidence in the case, which consisted of numerous opinions from medical experts that the claimant's condition has psychological origins. Allergy tests proved negative, and testing conducted in Ragle's home, car and office showed that the "sanctuary" she found in her home was actually more contaminated with mold than the office in which she worked and which she claimed caused her disability.

The health care provider's claim was denied because the Board found that it had actually been withdrawn, and the provider was instead seeking payment from Ragle. The Board declined to rule upon the merits of this claim, but noted that Ragle may not be required to pay for treatment or services if she can establish the existence of a work-related injury.

#### WORKPLACE: COLLECTIVE BARGAINING

- [23] *Williams Air Force Base, Ariz., and American Federation of Government Employees Local 1776*, Case No. SA-CA-20302 (Federal Labor Relations Authority) (decided April 30, 1993)

An administrative law judge has reportedly ruled that Williams Air Force Base violated Title VII of the Civil Service Reform Act of 1978 by unilaterally closing a hallway smoking area without offering the union an opportunity to negotiate the issue. According to the judge, closure of the smoking area forced smokers to use a gazebo that was exposed to 116 degree heat and "hordes of white flies." The employer had argued that the smoking area was closed because it was not properly ventilated, and the cost of upgrading the ventilation was not justified due to the planned closure of the facility some time in 1993. The judge rejected the employer's arguments and ordered the restoration of the hallway smoking area until the obligation to bargain has been complied with.

- [24] *Hi-Tech Cable Corp. and International Brotherhood of Electrical Workers, Local Union No. 1510*, 1992 WL 296023 (National Labor Relations Board) (decided September 30, 1992)

The National Labor Relations Board has determined that an employer was required to submit a change in its

workplace smoking policy to collective bargaining. The employer, Hi-Tech Cable Corp., unilaterally adopted a no-smoking policy at its facility and refused to negotiate the reasonableness of the rule with the union. The union filed a grievance which was denied, and one employee was issued a written warning for breach of the rule. On appeal, the Board held that the language of the collective bargaining agreement between the parties did not constitute a waiver of the union's statutory right to bargain about the implementation of a work rule. The employer was ordered to bargain over the issue and to remove the written warning from the employee's file.

#### LEGAL ISSUES AND DEVELOPMENTS

##### [25] Indoor Pollution Newsletter Features ETS Litigation

The April 1993 issue of the *Indoor Pollution Law Report* is devoted primarily to ETS litigation. According to an editor's note, the focus is the result of the EPA's designation of ETS as a "Class A carcinogen."

One article by Edward Sweda, Jr., a Massachusetts lobbyist for an anti-smoking group, summarizes the cases currently pending around the nation involving ETS issues. Sweda discusses the litigation filed in Connecticut by the mothers of asthmatic children against fast-food restaurants, *Staron v. McDonald's Corporation*; the prisoner case recently argued before the U.S. Supreme Court, *Helling v. McKinney*; the suit filed in Florida by airline flight attendants, *Broin v. Philip Morris Companies, Inc.*; and the case brought by a Mississippi barber against cigarette manufacturers, *Butler v. R.J. Reynolds Tobacco Co.*. A sidebar to the article lists the names of the attorneys representing some of the litigants in these cases.

Sweda also discusses the EPA Risk Assessment on ETS and states that it will be used to solidify the claims of the plaintiffs in *Broin* and *Butler*. According to Sweda, the plaintiffs' attorney in *Staron* told *The New York Times* that the risk assessment will provide the "bulk of the medical evidence" for the case, which will be litigated under the Americans with Disabilities Act.

Another article in this issue is written by Cynthia Langston-Lott. A former defense attorney, Langston-

Lott is currently an associate in the law firm representing the plaintiffs in the *Butler* case. She discusses the facts of the case from her perspective and devotes considerable attention to what she characterizes as the tobacco industry's delaying tactics. According to Langston-Lott, the plaintiffs are prepared to meet the challenges of facing well-financed opponents in court and plan to benefit from research and discovery conducted by other law firms in other tobacco litigation. She says, "It is the opinion of the author's firm that the key to tobacco litigation is keeping the court informed of the strategy of delay for which the tobacco industry is renowned in an effort to control such tactics from the onset." See *Indoor Pollution Law Report*, April 1993.

#### [26] Insurers Recommend IAQ Inspections

According to an article appearing in an insurance trade publication, sick building syndrome is linked, among other matters, to ETS and should be a subject of employer concern. The senior vice president and general counsel for the Gulf Insurance Group is quoted in the article and reports that there have been "rashes" of sick building claims in certain buildings within the last six to seven years, and that sick building syndrome can be expensive to employers in terms of health benefits and workers' compensation claims. This attorney further states that the presence of ETS in buildings may form the basis for sick building claims in light of the EPA Risk Assessment on ETS and suggests that companies with sealed windows consider conducting air quality tests to assess other possible sources of sick building complaints. See *National Underwriter, Property & Casualty/Risk & Benefits Management Edition*, April 19, 1993.

#### [27] BOMA Advises Building Owners to Ban Smoking

During an Americans with Disabilities Act compliance seminar conducted for building owners in Texas, a lobbyist for BOMA International advised participants to attack indoor air problems at the source, such as by prohibiting smoking. The lobbyist cited the New England Journal of Medicine report relating to the relationship between indoor air complaints and increased ventilation. He also reportedly observed that the Department of Justice has handled "thousands of complaints" since the ADA took effect more than a year ago. See *Austin Business Journal*, April 12, 1993.

### OTHER DEVELOPMENTS

#### [28] Division of Publishing House Issues Special Report on ETS

The Bureau of Business Practice (BBP), a Connecticut-based division of publisher Simon & Schuster, Inc., has issued a "Special Supplement to Fair Employment Practice Guidelines" that discusses the legal implications of the EPA Risk Assessment on ETS. Although the document contains a disclaimer that the publisher is not engaging in rendering legal advice, BBP concludes that the EPA report "is likely to strengthen the legal position of those individuals who claim they are affected by ETS" and advises employers that they face "serious legal ramifications" if they dismiss the complaints of nonsmokers about workplace ETS exposure.

The BBP discusses the respective legal positions of smokers and nonsmokers and addresses the potential for successful workers' compensation claims and for litigation under the Americans with Disabilities Act by those alleging sensitivity to ETS. The document erroneously states that, as of January 1993, 18 states had laws prohibiting discrimination against smokers, but advises employers to check the laws in their state if they have a policy of refusing to hire smokers.

A "Special Report" on ETS is being made available, free of charge, to those with BBP accounts, and a toll free telephone number is provided to those interested in reading more about the risk assessment and information from the Surgeon General, NIOSH, and "leading health and legal experts." According to BBP, the Report further "gives you the facts you need to show people throughout your organization how smoking bans and cessation programs benefit everyone."

#### [29] Antismoking Coalition Organizes Clean Indoor Air Week

Groups representing the African American, Asian/Pacific Islander and Latino communities reportedly urged restaurants and other Los Angeles businesses to ban smoking during Clean Indoor Air Week. The week was scheduled to begin on May 9, 1993, which was Mother's Day. One organizer reportedly said he and the members of his group felt people would be taking their mothers out and that "they would like to take her somewhere clean and smoke free to show her

they care." The event reportedly also garnered the support of several Los Angeles City councilpersons. See *Los Angeles Times*, May 8, 1993.

### [30] Pizza Hut to Test Smoking Ban

Pizza Hut chain restaurants will reportedly begin experimenting with a smoking ban. This according to the CEO of PepsiCo, the chain's corporate owner, who spoke recently about the company's financial picture for 1993. See *Reuters*, May 5, 1993.

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## MEDIA COVERAGE

### [31] "Separating Smokers Creates Growing Issue in Restaurants," C. Cambareri, *Capital District Business Review*, March 29, 1993

This article discusses efforts that are being taken by restaurateurs in recent years in response to complaints by nonsmokers about ETS in restaurants. Apparently, the move to separately ventilate smoking sections and/or totally ban smoking has intensified following the January 1993 release of the EPA Risk Assessment on ETS. One restaurant owner observed that smokers generally eat more and drink more than nonsmokers and that banning smoking could have an impact upon a restaurant's bottom line. According to a legislative director for one New York Assemblyman, the EPA designation of ETS as a Group A carcinogen leaves "no scientific dispute" about the issue.

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## SCIENTIFIC/TECHNICAL ITEMS

### LUNG CANCER

### [32] "The Etiology of Lung Cancer," D.G. Davila and D.E. Williams, *Mayo Clinic Proceedings* 68: 170-182, 1993 [See Appendix A]

This review article focuses on a number of factors thought to be associated with lung cancer and also discusses genetic, cellular and molecular aspects of the disease. A section of the article is devoted to a discussion of the ETS epidemiology; the authors propose

that the incidence of lung cancer is "clearly increased" with ETS exposure, but that estimation of the claimed risk is "controversial."

### [33] "Implications for Disease Misclassification in Epidemiological Studies of Lung Cancer Risk for Nonsmokers Exposed to Environmental Tobacco Smoke," A.W. Katzenstein, *Environment International* 19: 211-212, 1993 [See Appendix A]

The author of this letter to the editor addresses the 1992 review draft of the EPA Risk Assessment on ETS. He focuses on the lack of "[d]efinitive diagnosis" of primary lung cancer in many of the spousal smoking studies, suggesting that this results in "significant potential for disease misclassification," which could affect the EPA's reported risk estimate.

### [34] Letters to the Editor Regarding "Environmental Tobacco Smoke and Lung Cancer Risk in Non-smoking Women," H.G. Stockwell, A.L. Goldman, G.H. Lyman, C.I. Noss, A.W. Armstrong, P.A. Pinkham, E.C. Candelora, and M.R. Brusa, *Journal of the National Cancer Institute* 84(18): 1417-1422, 1992

The *Journal of the National Cancer Institute* recently published four letters concerning the Stockwell, et al., paper, which reported on a Florida case-control study of household and spousal smoking and lung cancer. As reported in Issue 31 of this report, the authors reported statistically significant risk estimates for 40 or more "smoke-years" of household exposure during adulthood and for 22 or more "smoke-years" of exposure during childhood and adolescents. Letters by Peter N. Lee, Maxwell W. Layard, Paul Switzer, and Heather G. Stockwell and several of her co-authors appear in the *Journal of the National Cancer Institute* 85(9): 748-751, 1993.

In his letter, Lee states that the Stockwell, et al., paper "adds little to the data on environmental tobacco smoke and lung cancer." He cites several potential sources of bias that could have affected the reported results. Lee comments on the method of control selection, the high proportion of surrogate respondents among cases, the interviewing process, and the potential for misclassification of smoking habits. Lee also notes that the possibility of dietary confounding was not considered, which he calls "remarkable," as

Stockwell and colleagues have elsewhere reported a "protective effect" of vegetable and carotene consumption on lung cancer risk. Lee also criticizes the presentation of data in the Stockwell, et al., paper, noting that risk estimates were not given for exposure indices for which no association was claimed. He also presents a table of meta-analysis results of the spousal smoking and lung cancer studies.

Layard's letter includes a discussion of the Candelora, Stockwell, et al., paper on dietary factors that was referenced by Lee. Layard notes that "strong inverse associations" were reported for lung cancer and total vegetable consumption and total carotene intake. Layard notes that the diet analyses did not take into account ETS exposure. He suggests that Stockwell, et al., should explore the possibility of associations between diet and ETS exposure that could lead to confounding. After mentioning another potential confounder, a history of nonmalignant lung disease, Layard notes that the "weakness of the overall epidemiologic data" on spousal smoking and lung cancer makes adjustment for potential confounders important.

Switzer references an editorial by David Burns, which supported the Stockwell, et al., study, and then states: "[T]he evident inconsistencies pointed out in the Stockwell report should give one pause." In particular, Switzer notes the contrast between the adenocarcinoma data reported in the Stockwell, et al., study (no association was reported) and the 1992 Fontham, et al., study (statistically significant risk estimates were reported). Switzer writes: "[H]unting expeditions through the data . . . can easily produce inconsistent artifacts." Switzer also comments on the large number of risk estimates presented by Stockwell, et al. He proposes that all the risk estimates reported to statistically significant may be related to only one statistically significant estimate, because the risk estimates are "overlapping." Switzer calls for investigators to describe their choices in reporting data, and to publish study protocols and reporting procedures in advance of data collection. Switzer also notes that the Stockwell, et al., paper did not include data on numbers of cases for the individual exposure categories, nor actual risk estimates for workplace and social exposures, calling the latter "a fine example of a publication bias."

In their response, Stockwell, et al., indicate that they are analyzing data on dietary factors in persons reportedly exposed to ETS. They say that the question of a "protective effect" of diet should be considered separately from the question of ETS exposure. With regard to Layard's comment on prior lung disease as a confounder, Stockwell, et al., propose that "a shared common exposure to ETS" is "a more likely explanation" for prior lung disease in persons with lung cancer. Commenting on Lee's concern about surrogate respondents, Stockwell, et al., suggest that their risk estimates based on surrogates were lower than those based on "self reports"; they suggest that "an even stronger association" would have been reported had fewer surrogates been used. In conclusion, Stockwell, et al., stress that their study had "positive findings," and that "dismissal of all such findings" on ETS exposure is becoming "increasingly difficult."

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## CARDIOVASCULAR ISSUES

- [35] "Carbon Monoxide and Cardiovascular Disease: An Analysis of the Weight of Evidence," J.H. Mennear, *Regulatory Toxicology and Pharmacology* 17: 77-84, 1993 [See Appendix A]

The author of this review article discusses the available data on exposure to carbon monoxide and cardiovascular responses, and the data on carbon monoxide levels in indoor air, including any possible contribution from ETS. He concludes that carbon monoxide could not be responsible for the claimed relationship of ETS exposure and cardiovascular disease.

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## RESPIRATORY DISEASES AND CONDITIONS — CHILDREN

- [36] "Child Day Care, Smoking by Caregivers, and Lower Respiratory Tract Illness in the First 3 Years of Life," C.J. Holberg, A.L. Wright, F.D. Martinez, W.J. Morgan, L.M. Taussig, and Group Health Medical Associates, *Pediatrics* 91(5): 885-892, 1993 [See Appendix A]

In this paper, data on child day care attendance and the occurrence of lower respiratory tract illnesses (LRIs)



are presented. The authors claim that the presence of three or more unrelated children in the day care setting and smoking by the "caregiver" are "significant independent risk factors" for LRIs.

- [37] "Risk Factors for Developing Wheezing and Asthma in Childhood," W.J. Morgan and F.D. Martinez, *Pediatric Clinics of North America* 39(6): 1185-1203, 1992 [See Appendix A]

The authors of this article discuss current data on potential risk factors for childhood asthma. They suggest that ETS exposure is associated with wheeze in young children and asthma in older children. The authors advocate parental education to reduce exposure to "exogenous risks," including ETS.

### OTHER CANCER

- [38] "Risk Factors for Renal Cell Carcinoma: Results of a Population-Based Case-Control Study," N. Kreiger, L.D. Marrett, L. Dodds, S. Hilditch, and G.A. Darlington, *Cancer Causes and Control* 4: 101-110, 1993 [See Appendix A]

Canadian researchers report on a case-control study of renal cell carcinoma (cancer of the kidney) in residents of Ontario. A number of potential risk factors were addressed, including active smoking, diet, and body mass. The authors report statistically nonsignificant risk estimates for "passive smoking" in nonsmoking cases, and claim that these data suggest that ETS exposure "appeared to increase risk somewhat."

- [39] "Parental Smoking and Risk of Childhood Brain Tumors," E.B. Gold, A. Leviton, R. Lopez, F.H. Giles, E.T. Hedley-Whyte, L.N. Kolonel, J.L. Lyon, G.M. Swanson, N.S. Weiss, D. West, C. Aschenbrener, and D.F. Austin, *American Journal of Epidemiology* 137(6): 620-628, 1993 [See Appendix A]

This study reports on analyses of data collected in a large case-control study of childhood brain tumors. The authors report statistically nonsignificant risk estimates for a number of indices of parental smoking and childhood brain cancer.

### OTHER HEALTH ISSUES

- [40] "Effects of Maternal Smoking Upon Neuropsychological Development in Early Childhood: Importance of Taking Account of Social and Environmental Factors," P.A. Baghurst, S.L. Tong, A. Woodward, and A.J. McMichael, *Paediatric and Perinatal Epidemiology* 6: 403-415, 1992 [See Appendix A]

This Australian study discusses measures of neuropsychological development (e.g., memory, learning, motor skills, verbal performance) in children whose mothers reportedly smoked during and/or after pregnancy, as compared to children of nonsmokers. While scores on the developmental measures were reportedly lower in children of smokers, the difference was not statistically significant after adjustment for a number of social and environmental factors.

- [41] "Smoking and the Sudden Infant Death Syndrome," E.A. Mitchell, R.P.K. Ford, A.W. Stewart, B.J. Taylor, D.M.O. Becroft, J.M.D. Thompson, R. Scragg, I.B. Hassall, D.M.J. Barry, E.M. Allen, and A.P. Roberts, *Pediatrics* 92(5): 893-896, 1993 [See Appendix A]

This paper is a further report on the New Zealand Cot Death Study; several reports of data from this study have recently been published. This article, however, focuses extensively on maternal and paternal smoking and the risk of SIDS. The authors report statistically significant associations after controlling for a large number of potential confounding factors. They claim that the criteria for a causal association between parental smoking and SIDS have been met.

- [42] "Smoking, Passive Smoking and Smell," P. Hepper, *Medical Science Research* 20: 265-266, 1992 [See Appendix A]

In this study, smokers, nonsmokers, and nonsmokers exposed to ETS were tested for their self-reported ability to perceive an odor. Smokers reportedly required a stronger concentration to identify an odor than did ETS-exposed persons, who, in turn, required a stronger concentration than did nonsmokers.